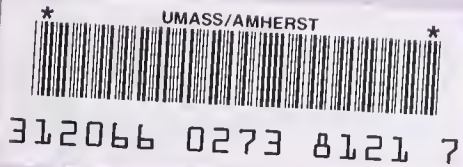


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DEPARTMENT OF EDUCATION

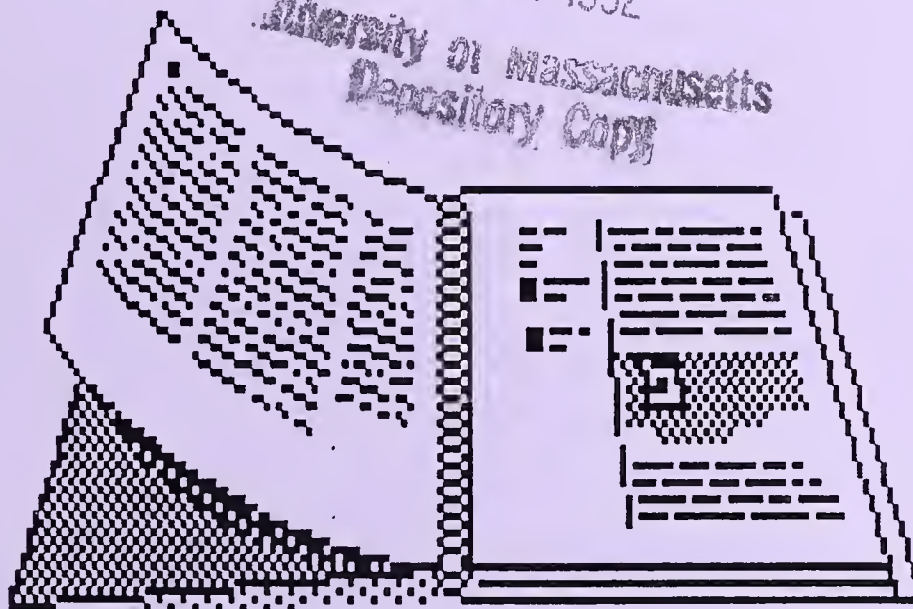
BUREAU OF SPECIAL EDUCATION APPEALS

BSEA HEARING PROCEDURES

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BSEA HEARING PROCEDURES

PREAMBLE

In 1972, the passage of Chapter 766 by the Massachusetts legislature, effective as of September 1, 1974, created a statutory right to a publicly supported education for all resident children with special needs. The Bureau of Special Education Appeals ("BSEA") was created to implement due process rights of parents, children and public schools when disputes arise concerning a child's educational program. The Bureau has jurisdiction over disputes between children and students, parents or guardians and local and state educational agencies involving any matter concerning the provision of a free appropriate public education to a child with special needs.

The BSEA has the authority to resolve educational disputes pursuant to M.G.L. c. 15 and 71B (popularly known as Chapter 766) and their implementing regulations, in particular 603 CMR 28.00, Chapter 4. The BSEA has jurisdiction to resolve educational disputes under federal law as well in accordance with 20 U.S.C. 1401 et seq. (P.L. 94-142) and 29 U.S.C. 794 (section 504 of the Rehabilitation Act of 1973) and the regulations promulgated thereunder: 34 CFR 300 and 34 CFR 104.

The BSEA hearing procedures are regulated by the Chapter 766 Regulations, Federal Due Process Procedures and Massachusetts Administrative Procedures Act, M.G.L. c. 30A, and its Rules of Adjudicatory Procedure, 801 CMR s. 1.00, et seq. These provisions require the Bureau to conduct fair and impartial hearings and to render written decisions based upon findings of fact and supported by substantial evidence.

These procedures should be read as consistent with the requirements of the above-cited statutes, regulations and relevant case law. Where the following procedures are viewed to be inconsistent with the above provisions of law, those provisions of law shall prevail. These procedures replace and supersede those set out in the Bureau of Special Education Appeals Guidelines, issued in 1983.

The procedures are not intended to either expand upon or restrict rights afforded the parties by statute, and should not be construed as conferring additional rights. These procedures will be followed unless in the judgment of the Hearing Officer alternate procedures would be more appropriate and consistent with law.

1. HEARING REQUEST

To begin the hearing process, a written request for a hearing must be filed with the BSEA and must contain the following information, to the extent available and known to the requesting party.

- a. Name, address (including town and zip code) and telephone number of student;
- b. Names, addresses (including town and zip code) and telephone numbers of parents or legal guardians;
- c. Name, address of responsible school district or state educational agency;
- d. Name, address (including town and zip code) and telephone number of the parties' advocates or attorney if any.
- e. A brief statement describing the disputed matter for which the hearing is being sought.
- f. The request for a hearing must be signed and dated by the person requesting the hearing.

2. WHO MAY REQUEST A HEARING

A hearing before the BSEA may be requested by:

- a. The student, if age 18 or older;
- b. The parent(s), legal guardian(s), or an educational advocate (surrogate parent) appointed by the Department of Education;
- c. The special education director of the responsible school district or state educational agency;
- d. An attorney or advocate for any of the above.

3. REPRESENTATION

An individual may appear on her or his own behalf. A local school district or state educational agency may designate an employee to act on its behalf. Any party has the right to be accompanied, represented, and advised by an attorney or advocate of its choosing.

4. INTERVENTION/JOINDER

- a. **Intervention/Joinder as a Party.** Upon written request the Hearing Officer may allow or direct any person who may be substantially and specifically affected by the proceeding to intervene, or to be joined, as a party in the entire proceeding or any part of it.



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- b. **Participation as a Non-Party.** Upon written request the Hearing Officer may permit any other interested persons to participate in the hearing in a manner consistent with their interest and the parents' and student's rights as directed by the Hearing Officer.

5. SCHEDULING HEARINGS

- a. **Scheduling the Hearing.** Under Section 402.0 of the Chapter 766 Regulations, within five (5) days of receipt of a written request for the hearing the Bureau will assign a hearing officer and will schedule a hearing to be held within 20 days after receipt of the written hearing request. The Bureau will send to the parties written notice of the scheduled date for the hearing with the name and telephone number of the hearing officer assigned to the case. The hearing officer will determine a time and location for the hearing which is reasonably convenient to the parties.
- b. **Reasonable Extensions of Time.** The hearing officer has the authority to grant specific extensions of time (postponements) at the request of the parent (student), their attorney or advocate, the public school representative, or his/her attorney. When the parent (student) or the public school is represented by an attorney or advocate, the hearing officer will communicate with the attorney or advocate regarding scheduling of the hearing.

Except in extraordinary circumstances, a party seeking an extension of time must make a written request to the hearing officer five (5) business days before the hearing date giving a reason for the requested postponement. S/he must also make reasonable efforts to contact the opposing party to seek agreement to the request. The hearing officer will determine whether or not the extension of time should be granted. When a postponement is granted, the hearing officer will set the new hearing date(s) and notify the parties of the new date(s) in writing.

6. EMERGENCY HEARINGS

- a. **Grounds.** When it appears that emergency circumstances warrant it, the BSEA may grant emergency relief. Emergency relief may be sought when:
 - 1) The health or safety of the student or other students would be endangered by delay;
 - 2) The special education services the student is currently receiving are sufficiently inadequate that harm to the student is likely;

3) The student is without an educational program or the student's educational program will be terminated or interrupted.

- b. **Requests.** Requests for emergency relief must be in writing and must include a specific statement of the problem and the relief being sought. A copy of the request shall be sent to the other party.
- c. **Hearings and Orders.** A hearing on an emergency request will be held no more than ten (10) days after the request is filed. If the parties and the Hearing Officer agree, requests for emergency relief may be decided on written material alone.

7. PRE-HEARING CONFERENCE

On the Hearing Officer's own initiative, or at the request of a party, the Hearing Officer may convene a pre-hearing conference to consider:

- a. Simplification or clarification of the issues;
- b. Possibility of obtaining stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreements which will avoid unnecessary proof;
- c. Limitation of the number of expert witnesses or avoidance of cumulative evidence;
- d. Possibility of agreement disposing of all or any of the issues in dispute; and
- e. Such other matters as may aid in the disposition of the case.

8. MOTIONS

- a. **Presentation/Objection.** A party may request that the Hearing Officer issue any order or take any action not inconsistent with the relevant law or regulations. Such a request shall be called a motion. Motions may be made in writing at any time after the initiation of the appeals process, or orally during a hearing. Each motion shall set forth the grounds for the desired order or action and state whether a hearing is desired. Written motions must be served on all parties and the Hearing Officer simultaneously. Any time within seven (7) days after a written motion is filed with the Hearing Officer, any party may file written objections to the allowance of the motion and may request a hearing on the motion.

- b. **Rulings on Motions.** If a hearing on a motion is warranted, the Hearing Officer shall give all parties at least three (3) days' notice of the time and place for hearing. The Hearing Officer may rule on a motion without holding a hearing if delay would seriously injure a party, or if the motion involves a matter as to which the presentation of testimony or oral argument would not advance the Hearing Officer's understanding of the issues involved, or if disposition without a hearing would best serve the public interest.
- c. **Basis for Rulings.** To support its motion, or opposition thereto, a party may offer only such evidence as is relevant to that particular motion. This evidence may consist of facts which are supported by affidavit, appear in records, files, depositions, or answers to interrogatories, or are presented by sworn testimony.

9. EXCHANGE OF INFORMATION

- a. **Informal.** The parties are encouraged to engage in voluntary exchange of information prior to the hearing. The parents are entitled to copies of the student's school records at any time. Documents to be submitted at the hearing must be exchanged between the parties and sent to the Hearing Officer at least five (5) days prior to the hearing.
- b. **Formal Requests for Discovery.** Formal request for discovery may be made any time after a request for a hearing is filed. The party upon whom the request is served shall respond within thirty (30) days unless a shorter or longer period is established by the Hearing Officer. Discovery will not be permitted to delay or interfere with the due process rights of the parties. In any event, documents to be submitted at the hearing must be exchanged between the parties and sent to the Hearing Officer at least five (5) days prior to the hearing.
 - 1) **Requests for Documents.** Any party may request any other party to produce or make available for inspection, copying or photocopying any documents or tangible things, not privileged, not previously supplied, and which are in the possession, custody, or control of the party upon whom the request is made.
 - 2) **Interrogatories.** A party may serve written interrogatories upon any other party for the purpose of discovering relevant, non-privileged information which has not previously been supplied through voluntary discovery. No party, without the approval of the Hearing Officer, shall serve more than thirty (30) interrogatories including subsidiary or incidental questions. Each interrogatory shall be separately and fully answered under the penalties of perjury unless it is objected to, in which event, the reasons for the

objection should be stated in lieu of an answer.

- 3) **Depositions.** In order to take the testimony of any witness by deposition, a party must file a written motion seeking approval from the Hearing Officer.

A) **Form and Content.** There shall be at least ten (10) days' notice to the parties of the motion to take a deposition. A motion requesting a deposition shall state the name and address of the witness to be deposed, the subject matter concerning which the witness is expected to testify, the time and place of taking the deposition, the name and address of the person before whom the deposition is desired, and the reason why such deposition should be taken.

B) **Authorization.** The Hearing Officer shall allow the motion only upon a showing that the parties have agreed to submit the deposition in lieu of testimony by the witness or the witness to be deposed cannot appear before the Hearing Officer without substantial hardship, and that testimony being sought is significant, not privileged and not discoverable by an alternate means.

C) **Scope and Conduct of the Deposition.** Depositions shall be taken orally before a person having power to administer oaths. Every witness testifying upon deposition shall be dully sworn, and the adverse party(ies) shall have the right to cross-examine. Objections to questions must set out the grounds relied upon. The testimony shall be reduced to writing and shall, unless waived, be signed by the witness, and certified by the officer before whom the deposition is taken. After the deposition has been subscribed and certified, it shall be forwarded to the Hearing Officer. Subject to appropriate rulings on objections, and the parties' agreement regarding its use, the deposition shall be received in evidence as if the testimony contained therein had been given by the witness in the proceeding.

c. **Objections/Protective Orders.** The party upon whom a request for discovery is served may within ten (10) days of services of the request, file with the Hearing Officer objections to the request or move for a protective order. Protective orders may be issued to protect a party from annoyance, embarrassment, oppression or undue burden, expense, or delay. Orders of the Hearing Officer may include limitations on the scope, method, time and place for discovery or provisions for protecting confidential information or documents.

10. **MOTIONS TO DISMISS**

Any party may move to dismiss for failure of the other party to prosecute, to comply with these rules or with any order of the Hearing Officer, to state a claim upon which relief can be granted, or to sustain its case after presentation of evidence. The granting of a Motion to Dismiss shall be considered a final decision.

11. **INACTIVE CASES**

When the party who requested the hearing fails to respond to notices or correspondence, file documents required by these rules, comply with orders, or otherwise indicates an intent not to continue with the prosecution of an appeal, the Hearing Officer may issue an order requiring that party to show cause why the appeal should not be dismissed for lack of prosecution. If that party fails to show such cause within thirty (30) days, the appeal may be dismissed.

In any event, a case that has not been scheduled, withdrawn or requested to be scheduled by either party within one year of the original request for hearing, shall be dismissed.

A dismissal under this section shall be a final action of the agency.

12. **SUBPOENAS; COMPELLING THE ATTENDANCE OF WITNESSES**

- a. **Issuance.** Upon the request of a party, or on its own motion, the BSEA may issue subpoenas to require a person to appear and testify and to produce documents at the hearing. A request for a subpoena shall be made in writing at least ten (10) days prior to the hearing and shall specify the name and address of the person to be subpoenaed, and a description of the documents to be produced.
- b. **Modification.** A person receiving a subpoena may request that the Hearing Officer vacate or modify the subpoena. The Hearing Officer may so do upon a finding that the testimony or documents sought are not relevant to any matter in question or are privileged, or that the time specified for compliance or the breadth of material sought imposes an undue burden on the person subpoenaed.
- c. **Enforcement.** If any person fails to comply with a properly issued subpoena, the party requesting the issuance of the subpoena may petition the Superior Court for an order requiring compliance with the terms of the subpoena.

13. EXHIBITS

- a. All parties shall exchange copies of all documents to be introduced and a list of the witnesses to be called at the hearing at least five (5) days prior to the hearing and shall forward copies of all such documents and the witness list to the BSEA.
- b. Whenever possible the documents forwarded to the BSEA shall consist of a jointly prepared set of Exhibits which does not include any duplicates and is organized as follows:
 - 1) **Uncontested Exhibits.** A chronological compilation of those documents which will be introduced at the hearing without objection from either party;
 - 2) **Contested Exhibits offered by Parent/Student.** A chronological compilation of those documents which the parent or student wants to introduce at the hearing over the objection of the responsible school district or state educational agency.
 - 3) **Contested Exhibits offered by School.** A chronological compilation of those documents which the responsible school district or state educational agency wishes to introduce at the hearing over the objection of the parent or student.
- c. All exhibits shall be numbered in the upper right hand corner, bound in a looseleaf notebook divided by tabs, and submitted to the BSEA along with a numbered index.

14. HEARINGS

- a. **Generally.** Hearings shall be scheduled, to the extent possible, at a time and place convenient to the parties. Hearings shall be as informal as is reasonable and appropriate under the circumstances. The Hearing Officer has the authority and obligation to ensure that appropriate standards of conduct are observed and that the hearing is conducted in a fair and orderly manner. The hearing is closed to the public and all information shall remain confidential unless the parents request otherwise.
- b. **Duties and Powers of the Hearing Officer.** The Hearing Officer shall have the duty to conduct a fair hearing; to ensure that the rights of all parties are protected; to define issues; to receive and consider all relevant and reliable evidence; to ensure an orderly presentation of the evidence and issues; to ensure a record is made of the proceedings; and to reach a fair, independent and impartial decision based upon the issues and evidence presented at the hearing and in accordance with the law. In furtherance of these duties the Hearing Officer may:

- 1) Administer the oath or affirmation to anyone who will testify at the hearing;
- 2) Assist all those present in making a full and free statement of the facts in order to bring out all the information necessary to decide the issues involved and to ascertain the rights of the parties;
- 3) Ensure that all parties have a full opportunity to present their claims orally, or in writing, and to secure witnesses and evidence to establish their claims;
- 4) Receive, rule on, exclude, or limit evidence;
- 5) Introduce into the record any regulations, statutes, memoranda, or other materials relevant to the issues at the hearing;
- 6) Change the date, time or place of the hearing *sua sponte* or at the request of the party, upon due notice to the parties; and continue the hearing to a subsequent date to permit either party to produce additional evidence, witnesses, and other information;
- 7) Request a statement of the issues and define the issues;
- 8) Regulate the presentation of the evidence and the participation of the parties for the purpose of ensuring an adequate and comprehensible record of the proceedings;
- 9) Issue subpoenas sua sponte or upon the request of any party to secure the presentation of evidence or testimony;
- 10) Examine witnesses and ensure that relevant evidence is secured and introduced;
- 11) Rule on any requests or motions that may be made during the course of BSEA proceedings;
- 12) Order additional evaluations at public expense;
- 13) Order written briefs to be submitted by the parties, establish the issues to be addressed by the briefs and set the deadline for their submission;
- 14) Reconvene the hearing for any purpose at any time prior to the issuance of a decision or pursuant to a post-hearing motion;
- 15) Censure, reprimand, or otherwise ensure that all participants conduct themselves in an appropriate

manner.

- c. **Evidence.** The Hearing Officer shall not be bound by the rules of evidence applicable to courts, but shall observe the rules of privilege recognized by law. Evidence shall be admitted only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.
- 1) **Documents.** The parties may offer as evidence written documents that they have exchanged prior to the hearing in accordance with these procedures. The Hearing Officer may permit or request the introduction of additional documentary evidence where no prejudice would result to either party.
 - 2) **Oral Testimony.** Oral testimony shall be given under oath or affirmation, subject to the pains and penalties of perjury. Witnesses shall be available for examination and cross-examination.
 - 3) **Regulations and Statutes.** Regulations and statutes may be put into evidence by reference to the citation or by submitting a copy of the pertinent regulation or statute.
 - 4) **Stipulations.** Stipulations of fact, or stipulations as to the testimony that would have been given by an absent witness, may be used as evidence at the hearing. The Hearing Officer may require evidence in addition to the stipulations offered by the parties.
 - 5) **Administrative Notice.** The Hearing Officer may take administrative notice of any fact of which judicial notice could be taken, and in addition may take administrative notice of statutes, regulations, and general, technical or scientific facts within the specialized knowledge of the Hearing Officer. Parties shall be notified of the material so noticed and they shall be afforded an opportunity to contest the substance or materiality of the facts noticed. Facts officially notified shall be included and indicated as such in the record.
 - 6) **Additional Evidence.** The Hearing Officer may require any party to submit additional evidence on any relevant matter.
 - 7) **Proof.** There is no formal burden of proof. In reaching a decision, Hearing Officers will assess the weight, credibility, and probative value of the evidence admitted into the record. Hearing Officers may use their experience, technical competence, and specialized knowledge in evaluating the evidence. The Hearing Officer's decision will be based upon a

preponderance of the evidence presented.

- d. **Close of the Hearing.** At the conclusion of all testimony the Hearing Officer has the discretion to permit or require the parties to make oral or written closing arguments. The hearing is formally closed when any additional documents permitted by the Hearing Officer are added to the record, or when written closing arguments, if any are received by the Hearing Officer, or upon the date such documents or arguments are due, whichever comes first. A decision will be issued within twenty-five days of the close of the hearing.
- e. **Failure to Appear.** Should a party fail to appear at the scheduled hearing, the Hearing Officer may take evidence and issue such orders as may be necessary including, but not limited to, ordering an educational placement for the child or defaulting the absent party.

15. **RIGHTS OF PARTIES**

- a. The following rights are accorded to the parties under the provisions governing Bureau proceedings:
 - 1) The right to be accompanied and advised by legal counsel, and advocates (individuals with special knowledge or training with respect to the issues of children with special needs).
 - 2) The right to present evidence, to confront, cross-examine, and, pursuant to a subpoena issued by the Bureau, to compel the attendance of witnesses.
 - 3) The right to prohibit the introduction of any evidence at the hearing that has not been disclosed to the parties at least five (5) days before the hearing.
 - 4) The right to obtain an electronic verbatim record of the hearing upon written request to the Bureau after the close of the hearing. The record may only be used in a manner consistent with these regulations and otherwise shall be kept confidential except with the consent of the parent.
 - 5) The right to receive a written decision setting forth the hearing officer's findings of fact and order, within forty-five (45) days of the receipt of a request for a hearing, provided that the hearing officer may grant specific extensions of time at the request of either party.
 - 6) The right to receive, upon request to the Bureau, a list of its impartial hearing officers with their qualifications.

- b. The following rights are accorded to parents under the provisions governing Bureau proceedings:
- 1) The right to have the child, who is the subject of the hearing, present at the hearing.
 - 2) The right to open the hearing to the public, otherwise the hearing shall not be open to the public.
 - 3) The right, pursuant to the Massachusetts Student Records Regulations, to inspect and to receive a copy of all student records pertaining to the child, including, but not limited to, the written record and clinical history of the evaluation, and any other school records and papers related to the identification, evaluation, placement or provision of a free appropriate public education to the child.
 - 4) The right to introduce an independent evaluation as evidence in the hearing, whether the independent evaluation was conducted at parental or school committee expense.
 - 5) The right to receive reasonable attorney's fees, if the parents prevail in the proceedings.

16. DECISION WITHOUT A HEARING

A party may request a decision without a hearing. All parties and the Hearing Officer must agree to a decision based solely on written material. The decision will have the same force and effect as any other BSEA decision.

17. DECISION; APPEAL

- a. The written findings of fact and decision of the hearing officer along with notification of the procedures to be followed with respect to appeal and enforcement of the decision shall be sent to the parents and their representatives, if any; to the representative of the child, if the child has had representation separate from the parents; and to the school committee and its legal representatives, if any.
- b. The decision of the Bureau is final and is not subject to further agency review. Any party aggrieved by the Bureau decision may file a complaint in the Superior Court of competent jurisdiction or in federal District Court for review of the Bureau decision. Under the provisions of M.G.L. c. 30A, s. 14(1), the complaint shall be filed within thirty (30) days of receipt of the final decision.
- c. Except as provided in paragraph d., the final decision of the Bureau shall be implemented immediately. Under M.G.L.

c. 30A, s. 14(3), appeal of the decision does not stay its effect. Rather, a party seeking to stay the decision of the Bureau shall seek a stay from the court having jurisdiction over the party's appeal.

- d. Unless the parents and the school committee agree otherwise, during the pendency of any judicial appeal of the Bureau decision, the child shall remain in the then current educational placement, unless the child's parents are seeking initial placement in the public school, in which case the child shall be placed in the public school program. Where the Bureau has ordered the school committee to place the child in a new placement, and the parents agree with that order, the school committee shall immediately implement the placement ordered by the Bureau.

The parents have the right to reject the decision of the Bureau Hearing Officer and to request placement of their child in the regular public school program. If such placement is requested, the school committee shall provide the child with the regular education program, unless the school committee determines that such placement would endanger the health and safety of such child, substantially disrupt the program for other children, or deny the child a free appropriate public education, in which case the school committee shall seek enforcement of the Bureau decision in state or federal court. The court shall have the authority upon such showing to order the child placed in an appropriate educational placement.

18. RECORD

At the conclusion of the administrative hearing, the BSEA will provide at no charge a copy of the tape recording of the hearing upon a written request by a party. Parties may arrange for the transcription of the tape recording at their own expense. Any party unduly burdened by the cost of preparation of a transcript for a judicial appeal may petition the BSEA for relief. Transcripts prepared for Court must be submitted to the BSEA for certification.

19. COMPLIANCE

A party contending that a decision of the BSEA is not being implemented may file a motion requesting the BSEA to order compliance with the decision. The motion shall set out the specific areas of alleged non-compliance. The Hearing Officer may convene a hearing at which the scope of inquiry will be limited to facts bearing on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance the Hearing Officer may fashion appropriate relief and refer the matter to the Legal Office of the Department of Education for enforcement.

